

October 18, 2013

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**Re: *Ex Parte Communication*
Special Access Rates for Price Cap Local Exchange Carriers,
WC Docket No. 05-25, RM-10593; Technology Transitions Policy
Task Force, GN Docket No. 13-5; Petitions to Launch a Proceeding
Concerning the TDM-to-IP Transition, GN Docket No. 12-353;
Connect America Fund, WC Docket No. 10-90**

Dear Ms. Dortch:

On October 10, 2013, AT&T sent letters to many of its special access customers, informing them that, effective November 9, 2013, AT&T will no longer offer new term plans longer than 36 months for tariffed TDM services.¹ These letters, which were distributed during the recent government shutdown, eliminate the five- and seven- year term plans that many customers have come to rely on when obtaining special access services. By unilaterally forcing these customers onto shorter term plans, AT&T is effectively raising its rates by eliminating the additional discounts it has issued when customers commit to longer term plans.² These lost discounts will result in substantial

¹ AT&T “Accessible Letter” No. ACCESS13-063, *AT&T 13-STATE – Announces the Elimination of Term Plans Exceeding 3 Years for Multiple Digital Services* (Oct. 10, 2013), attached as Exhibit A; AT&T “Accessible Letter” No. CLECSE13-082, *AT&T Southeast Region – Announces Elimination of Term Plans Exceeding 3 Years for Multiple Digital Services* (Oct. 10, 2013), attached as Exhibit B; *see also* AT&T “Accessible Letter” No. ACCESS13-064, *AT&T 13-STATE – Announces Expiration Dates on Term Plans for Specific Optical Services* (Oct. 10, 2013), attached as Exhibit C (establishing fixed termination dates for future term commitments for OCn point-to-point services, dedicated SONET Ring Service, OC-192 SONET Ring Service, OPT-E-MAN and CSME Service).

² Customers have long been forced to enter into anticompetitive volume and term agreements in order to receive the accompanying discounts and avoid the even more egregious month-to-month rates that would otherwise apply. *See, e.g.*, Declaration of Stanley M. Besen and Bridger M. Mitchell, *Anticompetitive Provisions of ILEC Special Access Arrangements*, attached as Appendix A to Comments of BT Americas, *et al.*, WC Docket No. 05-25, at 32 ¶ 55 (Feb. 11, 2013) (Redacted Version). AT&T’s most recent

price increases for special access customers. Sprint, for example, estimates that AT&T's proposed action will increase special access prices by as much as 24 percent.³

AT&T's rate hike will cost carriers, and the customers they serve, tens of millions of dollars and will have a sweeping effect on a wide range of services and activities. For example, carriers depend on DS1 and DS3 special access services to connect to the public safety answering points ("PSAPs") they need to reach to provide 9-1-1 services. In addition, in most instances, competitive carriers have been forced to use TDM-based circuits to interconnect with AT&T for the exchange of voice traffic, since AT&T refuses to interconnect via IP-based circuits.⁴ Thus, AT&T is using its market power both to require TDM-based interconnection and to raise the costs of the circuits required to accomplish that interconnection.

Moreover, businesses and mass market consumers will be hurt by AT&T's rate hike because special access is a pervasive component of nearly every communications service they use, from residential Internet access to corporate intranets to cellular service. AT&T's price increases will raise the costs of these retail services because they are provided via special access services that service providers obtain from AT&T and its subsidiaries. Ultimately, then, AT&T's actions will harm American businesses and consumers that depend on special access services to accomplish a wide array of day-to-

action extends that abuse of market power by reducing even further the options for purchasing these necessary inputs.

³ This estimate is based on an analysis of AT&T's tariffs and reflects the difference in the costs of a ten-mile DS3 circuit with two channel terminations under currently-available five or seven year plans versus the prices for the same circuit under a three-year plan. Sprint's analysis also shows that the price of a similar DS1 circuit would increase by as much as 14 percent if customers are forced to move to a three-year term plan.

⁴ See, e.g., Reply Comments of Sprint Nextel Corporation, GN Docket No. 12-353, at 2 (Feb. 25, 2013) ("Sprint has no voice IP interconnection agreements with the AT&T or Verizon incumbent LECs, and AT&T has continued to assert that it has no obligation under the Act to interconnect with Sprint on an IP basis."); Comments of Cablevision Systems Corporation, GN Docket No. 12-353, at 3 (Jan. 28, 2013) ("Large ILECs may have little incentive to upgrade their interconnection facilities to IP, as they derive revenues from transporting TDM traffic and raise their IP-based competitors' costs by requiring them to convert traffic to TDM."); Comments of Cbeyond Communications, LLC, *et al.*, GN Docket No. 12-353, at 12-13 (Jan. 28, 2013) (noting that AT&T has refused requests for SIP interconnection for the exchange of local voice traffic); Comments of Sprint Nextel Corporation, WC Docket No. 10-90, at 12 (Feb. 24, 2012) ("Last year, AT&T was unable to identify a single IP interconnection agreement that its ILEC affiliates had executed . . ."); see also Comments of XO Communications, LLC, GN Docket No. 13-5, at 12-13 (July 8, 2013).

day activities, such as processing credit card transactions, sending emails, tracking inventory, managing manufacturing facilities, surfing the Web, using an automated teller machine (“ATM”), calling customer service, or reaching emergency services.

At bottom, AT&T’s letters regarding the changes to its term plans are little more than an effort to exploit its market power before the Commission has had a chance to conclude its pending proceedings on special access prices and the transition from TDM to IP based networks.⁵ The very fact that AT&T can unilaterally impose a substantial price increase on its customer base is a sign of its continuing market power over a broad range of special access services.⁶ The question of whether AT&T retains market power in the special access marketplace is at the heart of many of the Commission’s ongoing proceedings, including in the special access proceeding.⁷ Indeed, the Commission’s proposed data request is designed to help it gather the information it needs to resolve

⁵ AT&T’s market power derives, in large part, from the fact that it is the only carrier with last-mile facilities-based connections to a majority of commercial buildings within its in-region footprint. *See, e.g.*, Reply Comments of XO Communications, Inc., WC Docket No. 05-25, at 12 (March 12, 2013) (noting AT&T’s “pervasive reach to commercial buildings within its territory”).

⁶ It is well-established that an entity has market power when it can profitably raise prices. *See Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (determining market power includes a showing of “the ability to raise prices significantly without going out of business”); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 18 n.54 (2005) (“Market power is defined as the ‘ability to raise prices by restricting output,’ or ‘to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.’”) (citation omitted). *See also, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984).

⁷ *See, e.g., Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, ¶ 67 (2012). The extent of the BOCs’ market power is also the crux of the petition to reverse forbearance that is currently pending in this docket. *Petition of Ad Hoc Telecommunications Users Committee, et al. to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based Special Access Services*, WC Docket No. 05-25 (Nov. 2, 2012); *see also* *Petition of tw telecom inc., et al. to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services*, WC Docket No. 11-188 (Oct. 4, 2011).

disputes over the extent of the former Bell Operating Companies' ("BOCs") market power.⁸

AT&T's letters also have implications for the ongoing proceedings regarding the transition from TDM to IP.⁹ AT&T appears to be trying to dictate the terms of that transition by making its TDM-based services more expensive. This will allow AT&T to leverage its market power in TDM special access to increase the price it charges for its IP-based alternatives to TDM special access.

Accordingly, and for all the reasons explained above, the Commission should prohibit AT&T from effectuating its proposed price increases until the FCC has resolved its ongoing proceedings examining AT&T's market power over special access services – including Ethernet services¹⁰ – and the appropriate transition to IP-based networks. In the meantime, the Commission should not permit rate increases, such as those proposed

⁸ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Report and Order, DA 13-1909, ¶ 2 (rel. Sept. 18, 2013). AT&T's ability to impose unilaterally unjust and unreasonable rate increases in areas where it has been granted pricing flexibility is a central issue in the pending special access proceeding. It is worth noting, moreover, that in areas that are subject to price caps, AT&T's proposed changes to its term discount offerings may well raise its actual price index ("API") above its price cap index ("PCI"). See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd 10557, ¶ 10 n.23 (2012) ("Pricing Flexibility Suspension Order") (explaining that a price cap LEC's rates are in compliance with the Commission's rules if the API is less than or equal to the PCI); see also 47 C.F.R. § 61.49(d) (explaining the showings a price cap carrier must make if it proposes rates that will result in an API that exceeds the applicable PCI).

⁹ See, e.g., *Technology Transitions Policy Task Force*, GN Docket No. 13-5; *Petitions to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353.

¹⁰ Prices and regulations for TDM and non-TDM-based special access services are interrelated, at least to the extent that the Commission has relied on the availability of price-regulated TDM-based services to justify forbearance from dominant carrier regulation of AT&T's non-TDM services. See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶¶ 25, 60 (2007).

by AT&T, to take effect.¹¹ Refusing to allow AT&T to effectuate its price increase while the Commission evaluates issues related to AT&T's market power would be consistent with the Commission's decision to suspend its rules governing grants of pricing flexibility, while it works to conclude the special access proceeding.¹²

Respectfully submitted,

AD HOC TELECOMMUNICATIONS USERS
COMMITTEE

/s/ Colleen Boothby
Colleen Boothby
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Ninth Floor
Washington, DC 20036
(202) 857-2550
*Counsel for Ad Hoc Telecommunications
Users Committee*

EARTHLINK, INC.

/s/ Christopher Murray
Christopher Murray
Senior Vice President, Public Policy
1375 Peachtree Street
Atlanta, GA 30309
(404) 815-0770

CBEYOND, INC.

/s/ William Weber
William H. Weber
General Counsel
320 Interstate North Parkway, SE
Atlanta, GA 30339
(678) 370-2327

LEVEL 3 COMMUNICATIONS, LLC

/s/ Michael Mooney
Michael Mooney
General Counsel, Regulatory Policy
1025 Eldorado Blvd.
Broomfield, CO 80021
(720) 888-2538

¹¹ Some of AT&T's proposed changes will require it to file tariff revisions, and the undersigned parties plan to file petitions asking the Commission to reject or suspend and investigate those tariff revisions. *See* 47 C.F.R. § 1.773.

¹² *See Pricing Flexibility Suspension Order.*

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MEGAPATH CORPORATION

/s/ Katherine K. Mudge
Katherine K. Mudge
*Vice President – Regulatory Affairs &
Litigation*
1835B Kramer Ln., Ste. 100
Austin, Texas 78758
(512) 794-6197

TW TELECOM INC.

/s/ Michael Rouleau
Michael Rouleau
*Senior Vice President – Business
Development and Public Policy*
10475 Park Meadows Drive, Suite 400
Littleton, CO 80124
(303) 566-1288

SPRINT CORPORATION

/s/ Charles McKee
Charles W. McKee
*Vice President, Government Affairs,
Federal and State Regulatory*
Chris Frentrup
Director, Senior Economist
900 Seventh Street, NW, Suite 700
Washington, DC 20001
(703) 433-3205

XO COMMUNICATIONS

/s/ Lisa R. Youngers
Lisa R. Youngers
*Vice President and Assistant General
Counsel – Federal Affairs*
13865 Sunrise Valley Drive
Herndon, VA 20171
(703) 547-2000

Exhibit A



AT&T 13-STATE - Announces the elimination of Term Plans Exceeding 3 Years for Multiple Digital Services

Date: October 10, 2013

Number: **ACCESS13-063**

Category: Special Access

Issuing ILECS: AT&T Illinois, AT&T Indiana, AT&T Ohio, AT&T Michigan, AT&T Wisconsin, AT&T California, AT&T Nevada, AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, AT&T Texas and AT&T Connecticut (collectively referred to for purposes of this Accessible Letter as "AT&T 13-State")

Contact: Account Manager

Subject to any delays resulting from the federal government shutdown, effective November 9, 2013, AT&T 13-State no longer will offer new term plans longer than 36 months for tariffed TDM services. Existing services under term plans that are longer than 36 months and already in place as of November 9, 2013 will remain subject to the terms and conditions of those plans until their terms expire, at which time customers may either select from the term plans for which they are eligible under the expiring plan, or continue receiving service under month-to-month or monthly extension rates.

AT&T 13-State is modifying its ordering systems to reflect these tariff changes. Upon completion of those modifications, if a customer submits an order for a term plan longer than 36 months, the order will be rejected automatically.

System modifications may not be fully implemented immediately. Until those modifications are complete, if a customer submits an order for a term plan longer than 36 months, AT&T's ordering systems may automatically return a firm order confirmation ("FOC") that incorrectly confirms such order, contrary to the terms of AT&T's tariff. In that case, AT&T will notify the customer that the term plan ordered is not available. The notice will be provided by email (to the address identified by the customer), as soon as possible after submission of the order. That notice will supersede any confirmation, via FOC or otherwise, of the term plan originally chosen by the customer. AT&T's email notice will inform the customer of its intent to revise the term (and associated rate) applicable to the customer's order to reflect a 36-month term plan (*i.e.*, the maximum term offered pursuant to AT&T's tariff), unless the customer modifies or cancels the order prior to the service due date (in which case no order modification or cancellation charges will apply).

Notice of the revision also will be reflected in the customer's first bill. When a customer receives such a notice, the customer may decline the charges by issuing a disconnect order (without early termination charges) if the customer does not wish to accept service under a 36-month term plan. If the customer does not issue a disconnect order prior to the due date of the first bill for the service, the customer will be deemed to have acknowledged and approved the order for the 36-month term plan.

AT&T reserves the right to modify or to cancel the information in this Accessible Letter. In the event of such modification or cancellation, AT&T will notify carriers in a subsequent Accessible Letter. AT&T will incur no liability if the information in this Accessible Letter is modified or cancelled.

The changes apply to the following special access service types:

- Analog Private Line and DS0 Services
- DS1 and DS3 Services

A detailed list of AT&T 13-state Tariff sections impacted is provided in Exhibit 1:



Exhibit 1 - 13-State
Tariff Term Plan Elimir

If you have questions related to these changes, please contact your AT&T Account Manager.

Exhibit B



Date: **October 10, 2013**

Number: **CLECSE13-082**

Effective Date: **November 9, 2013**

Category: **Special Access**

Subject: **(BUSINESS PROCESSES) AT&T Southeast Region - Announces Elimination of Term Plans Exceeding 3 Years for Multiple Digital Services**

Related Letters: **NA**

Attachment: **Yes**

States Affected: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee**

Issuing ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to for purposes of this Accessible Letter as "AT&T Southeast Region")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Subject to any delays resulting from the federal government shutdown, effective November 9, 2013, AT&T no longer will offer new term plans longer than 36 months for tariffed TDM services. Existing services under term plans that are longer than 36 months and already in place as of November 9, 2013 will remain subject to the terms and conditions of those plans until their terms expire, at which time customers may either select from the term plans for which they are eligible under the expiring plan, or continue receiving service under month-to-month or monthly extension rates.

AT&T is modifying its ordering systems to reflect these tariff changes. Upon completion of those modifications, if a customer submits an order for a term plan longer than 36 months, the order will be rejected automatically.

System modifications may not be fully implemented immediately. Until those modifications are complete, if a customer submits an order for a term plan longer than 36 months, AT&T's ordering systems may automatically return a firm order confirmation ("FOC") that incorrectly confirms such order, contrary to the terms of AT&T's tariff. In that case, AT&T will notify the customer that the term plan ordered is not available. The notice will be provided by email (to the address identified by the customer), as soon as possible after submission of the order. That notice will supersede any confirmation, via FOC or otherwise, of the term plan originally chosen by the customer. AT&T's email notice will inform the customer of its intent to revise the term (and associated rate) applicable to the customer's order to reflect a 36-month term plan (*i.e.*, the maximum term offered pursuant to AT&T's tariff), unless the customer modifies or cancels the order prior to the service due date (in which case no order modification or cancellation charges will apply).

Notice of the revision also will be reflected in the customer's first bill. When a customer receives such a notice, the customer may decline the charges by issuing a disconnect order (without early termination charges) if the customer does not wish to accept service under a 36-month term plan. If the customer does not issue a disconnect order prior to the due date of the first bill for the service, the customer will be deemed to have acknowledged and approved the order for the 36-month term plan.

AT&T reserves the right to modify or to cancel the information in this Accessible Letter. In the event of such modification or cancellation, AT&T will notify carriers in a subsequent Accessible Letter. AT&T will incur no liability if the information in this Accessible Letter is modified or cancelled.

The changes apply to the following special access service types:

- Analog Private Line and DS0 Services
- DS1 and DS3 Services

A detailed list of AT&T Southeast Tariff sections impacted is provided in Exhibit 1:



Exhibit 1 - Southeast
Tariff Term Plan Elimir

If you have questions related to these changes, please contact your AT&T Account Manager.

AT&T reserves the right to modify or to cancel the information in this Accessible Letter. In the event of such modification or cancellation, AT&T will notify carriers in a subsequent Accessible Letter. AT&T will incur no liability if the information in this Accessible Letter is modified or cancelled.

Exhibit C



AT&T 13-STATE - Announces Expiration Dates on Term Plans for Specific Optical Services

Date: October 10, 2013

Number: **ACCESS13-064**

Category: Special Access

Issuing ILECS: AT&T Illinois, AT&T Indiana, AT&T Ohio, AT&T Michigan, AT&T Wisconsin, AT&T California, AT&T Nevada, AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, AT&T Texas and AT&T Connecticut (collectively referred to for purposes of this Accessible Letter as "AT&T 13-State")

Contact: Account Manager

Effective November 9, 2013, AT&T 13-State will grandfather certain term plans associated with the following access services:

- Optical Carrier Network (OCN) Point-to-Point Service
- Dedicated SONET Ring Service and OC-192 Dedicated SONET Ring Service
- OPT-E-MAN[®] and CSME Service

Grandfathering will be implemented by establishing fixed termination dates for future term commitments under the grandfathered term plans, which will apply regardless of the nominal lengths of those term plans. In other words, once the fixed expiration dates become effective, affected term plans will expire on those dates, regardless of when they would otherwise expire. Interstate Access Guidebook changes implementing the fixed termination dates are being made sufficiently in advance of the fixed termination dates and existing term commitments will not be affected.

The expiration dates for new term plans vary by service. All term plans which are established, or those that are renewed or extended, after November 9, 2013, with term lengths that otherwise would expire at any time after the fixed term plan expiration dates, will instead expire on the fixed term plan expiration dates. Following the expiration of the term plans, services will be provided on a month-to-month basis at the applicable month-to-month rates.

A list of AT&T 13-State Guidebook sections, services impacted, and term plan expiration dates is attached as Exhibit 1:



Exhibit 1 - 13-State
Guidebook Term Plan

If you have questions related to these changes, please contact your AT&T Account Manager.

AT&T reserves the right to modify or to cancel the information in this Accessible Letter. In the event of such modification or cancellation, AT&T will notify carriers in a subsequent Accessible Letter. AT&T will incur no liability if the information in this Accessible Letter is modified or cancelled.